APPEAL NO. 93467

At a contested case hearing held on May 17, 1993, in (city), Texas, the hearing officer, (hearing officer), concluded that the respondent (claimant) proved by a preponderance of the evidence that he sustained a lower back injury in the course and scope of his employment on or about (date of injury), and that he reported his injury within 30 days as required by the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-5.01(a) (Vernon Supp. 1993) (1989 Act). The appellant (carrier) challenges the sufficiency of the evidence to support these conclusions as well as the underlying factual findings. The carrier's contention is that while claimant did sustain a compensable right shoulder injury in his fall from a ladder on (date of injury), which he timely reported to his employer, he did not sustain a lower back injury in that accident. Carrier's contention was grounded on evidence that claimant did not complain of the onset of back pain to the employer, the carrier, or the doctors he saw until late May 1992, several months after the accident. The claimant's response points to the evidence of claimant's complaints of the onset of back pain within several weeks of his accident and urges our affirmance.

DECISION

The evidence being sufficient to support the challenged findings and conclusions, the hearing officer's decision is affirmed.

The hearing officer's accurate and detailed summary of the evidence is adopted and need not be repeated. Succinctly, on (date of injury), claimant, then 52 years of age, slipped climbing a ladder at work and fell part way down before catching himself on the ladder with his arms and feet. He said he reported the injury that day. He signed an employer's incident report form on April 1st which reflected a strained shoulder injury from the accident. On April 1st he was seen by Dr. D for right shoulder pain and was diagnosed with probable subacromial bursitis and "rule out rotator cuff tear." Claimant later selected (Dr. W), an orthopedic surgeon, for treatment of his shoulder, a choice he said he came to regret. He saw Dr. W on April 6th, was diagnosed with a possible torn rotator cuff tear, and was referred for a CT scan with arthrogram.

Claimant maintained, with corroborative testimony from his wife, a friend, and a coworker, that he began to experience lower back pain in the area of his right hip with radiation down his leg within a few weeks of (date of injury). He said he did not then appreciate the seriousness of his back problem but that the pain got progressively worse. The arthrogram ordered by Dr. W was repeatedly delayed and by the time it was finally performed (May 19th) his shoulder was much improved but his back pain was substantially worse. Claimant was seen by (Dr. F) on May 29th for his back pain, mentioned his ladder accident, but did not recall any particular hip injury at that time.

Claimant said he called the carrier's adjuster, (Mr. P), about his back pain on or about June 1st and was advised to see Dr. W about it. According to claimant, Dr. W told him he had first come in with a shoulder injury and now several weeks later was coming back in

with back complaints, and that he, Dr. W, was getting paid for the shoulder treatment, not for the back. Claimant said that Dr. W stated, before seeing any x-rays or examining him: "I'm going to tell you right now it ain't got nothing to do with the job." Dr. W's record of June 1st reflected that claimant complained of pain in the right buttock area with radiation, which had been present for approximately one month and was getting progressively worse. Dr. W wrote a letter addressed to "To Whom it May Concern," dated June 22nd, stating he could not associate claimant's back injury with his right shoulder injury.

Claimant, who said he had a poor relationship with Dr. W, was later referred to (Dr. G). Dr. G's record of July 6, 1992, stated that if claimant's history of the onset of lower back pain approximately two weeks after his accident, which got progressively worse with radiation down his legs, were true, his back problem "would be worker's comp related." A CT scan of June 29th revealed a disc protrusion with rupture at the right L4-5 level which was putting pressure on the right L4 root. Additionally, the scan showed degenerative disc changes at the L4-5 and L5-S1 levels. Dr. G's notes reflected that he sent the carrier his notes and was advised that the carrier would not pay for the back injury because of the time lag between the accident date and the onset of symptoms which the carrier contended was two months, not the two to three weeks stated by claimant. The carrier filed a Notice of Refused/Disputed Claim (TWCC-21) with the Texas Workers' Compensation Commission (Commission) on July 9th disputing the relationship of the back pain to the right shoulder injury because the first complaint of back pain was about two and one-half months after the (date of injury) accident and referencing claimant's May 29th visit to Dr. F. The TWCC-21 also referred to an attached letter from Dr. W. Dr. G nevertheless felt back surgery was required, advised claimant to call his group health carrier, and performed surgery at the L4-5 and L5-S1 levels on July 27th. The carrier introduced records of Dr. G dictated July 31st which stated that claimant did not have any substantial back pain complaints until sometime in May 1992 and that "this does not appear to be related to any workermen's (sic) compensation injury situation." Claimant said that Dr. G was concerned about payment for the back treatment and explained that Dr. G made such statements to help him get his health insurance carrier to pay since the workers' compensation carrier disputed the back injury and he needed surgery.

The carrier's adjuster, Mr. P, testified that he spoke with claimant on April 9th, May 14th, and May 20th at which times claimant never mentioned back pain. He said that on June 1st claimant called to advise him of the back pain and ask what to do about it. He told claimant to see (Dr. W) who had treated the shoulder injury. Mr. P said he wrote Dr. G after seeing the latter's July 6th record entry because he felt the history was not true given claimant's having failed to mention back pain to him in three conversations and the absence of the complaint in a medical record before May 29th.

Claimant had the burden to prove that his back injury was compensable and that he either provided timely notice of his injury to his employer or had good cause for his failure so to do. The hearing officer found that claimant experienced the onset of lower back symptoms two to three weeks after his original injury, that medical evidence established that

if he did experience such symptoms within two to three weeks his lower back symptoms were probably work related, that he injured his lower back on (date of injury) while working for his employer, and that he reported his injury within 30 days of (date of injury) and did not have to appreciate "the full extent of his injuries" to have given notice of injury. We are satisfied the evidence sufficiently supports these findings as well as the challenged conclusions.

The hearing officer is the trier of fact in a contested case hearing, and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Articles 8308-6.34(e) and (g). As the trier of fact, the hearing officer resolves conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). He or she is privileged to believe all or part or none of the testimony of any one witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). The hearing officer is not bound to accept the testimony of the claimant at face value. Garza, *supra*. As an interested party, the claimant's testimony only raises an issue of fact for determination by the trier of fact. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo, no writ). As the trier of fact, the hearing officer also judges the weight to be given expert medical testimony, and resolves conflicts and inconsistencies in the testimony of expert medical witnesses. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ); Atkinson v. United States Fidelity Guaranty Co., 235 S.W.2d 509 (Tex. Civ. App.-San Antonio 1950, writ ref'd n.r.e.); Highlands Underwriters Ins. Co. v. Carabajal, 503 S.W.2d 336, 339 (Tex. Civ. App.-Corpus Christi 1973, no writ). The challenged findings and conclusions of the hearing officer are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 751 S.W.2d 629 (Tex. 1986).

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge